Nos. 12716, 12813

In the United States Court of Appeals for the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION, APPELLANT

v.

WILLIAM J. COGAN, APPELLEE

WILLIAM J. COGAN, APPELLANT

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

CHARLES T. JONES, APPELLANT

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

WILLIAM J. COGAN AND CHARLES T. JONES, APPELLANTS

v.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY ET AL., APPELLEES

ANSWERING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

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ANSWERING BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

PRELIMINARY STATEMENT

Pursuant to a stipulation of the parties approved by this Court (R. 104–7), we address ourselves in this brief to those contentions in the opening brief for Cogan and Jones (hereinafter referred to as Cogan's brief) which we did not anticipate and answer in our opening brief.[1] First we comment briefly on other aspects of his brief.

1. Cogan's brief does not argue the issue of his fee, as to which he is appellee, although his contentions with respect thereto are stated in his summary of argument (at page 18).[2] Since his argument on the

[1] This stipulation, which was entered into in order to expedite the disposition of the appeals, provides that the opening briefs shall contain the arguments of the parties not only on the questions as to which they are appellants, but also on the questions as to which they are appellees, and that the answering briefs shall contain the arguments of the parties on any question raised in the opening briefs to which the parties have the right to argue in answer or reply. No additional briefs were to be filed without further order of this Court. In accordance with this stipulation, the Commission's opening brief argues the issue of Cogan's fee as to which the Commission is appellant, and also answers the arguments we anticipated would be made by Cogan with respect to the issue of a release for Standard Power as to which Cogan and Jones are appellants (see our opening brief, p. 19, n. 20).

[2] His brief also refers (p. 22) to six letters and a telegram printed in the Appendix to the brief (pp. 106–111) which, it is asserted, "without further proof in the matter" indicate that Cogan "was attempting to serve the best interests of the Prior Preference Stockholders of Market Street * * * at all times." These communications appear under the heading "Record Exhibit" without any precise reference to the record on appeal. While some of these documents were presented to the district court or referred to in argument before the district court (T. R. 610–613), so far as we have been able to ascertain none of them was offered in evidence before the Commission. In any event they clearly do not rebut the specific findings of the Commission that Cogan improperly served conflicting personal interests while purporting to represent the public stockholders of Market Street.

fee issue has been saved for his answering brief, we are unable to reply to it in this brief.

2. The factual statements in Cogan's brief are incomplete, argumentative, and generally are not accompanied by record references. We disagree with Cogan's version of the facts and rely for answer thereto upon the fully documented statement in our opening brief.

3. The summary of argument in Cogan's brief (pp. 17–20) includes other contentions not discussed in his argument proper. Paragraphs (j) and (k) (p. 19) refer separately to a conference between members of the Commission's staff and counsel for Standard Gas and for Market Street after Cogan's letter of October 21, 1949, had advised the Commission that he had started a derivative action against Standard Power (see also pp. 8–9). We are unable to surmise the basis for the contention that the staff members "improperly participated," since it is, of course, the practice, and duty, of the staff of the Division of Public Utilities to confer with the companies subject to regulation and other parties to the proceeding as to appropriate steps to be taken.[3] *Cf. Phillips* v. *S. E. C.,* 153 F. 2d 27, 32 (C. A. 2, 1946), certiorari denied 328 U. S. 860, where the Court, in rejecting a contention that the Commission had made an ex parte adjudication on the basis of a conference between the president of a company in Section 11 (e) reorganization and members of the Commission and its staff, stated:

> These conversations seem to us no more than

[3] Cogan refers without criticism to an instance where staff members conferred with him (T. R. 452, 464).

> legitimate prehearing conferences of the kind which the commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man. Certainly a court would not be justified in interfering with such helpful preliminary conferences to expedite the settlement of details without a very definite showing of prejudice to an aggrieved party or eventual denial of a fair hearing.

See also *In re American & Foreign Power Co., Inc.*, 80 F. Supp. 514, 525 (D. Me., 1948).

ARGUMENT

I

The Commission properly treated the initial plan as settling all controversies between Market Street and Standard Gas and its subsidiaries, including Standard Power, and it properly accepted from the new board of directors of Market Street a suggested amendment to the plan which was consistent with that treatment although the amendment had previously been rejected by the old board

Cogan contends (pp. 20, 22–25) that the Commission was not warranted in treating the initial plan, as the Commission stated in its supplemental findings and opinion of March 9, 1950, just as if there had been no settlement and "as one which was offered to resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power, as a step in the final winding up and dissolution of Market Street" (P. R. 91, 93–94). The Commission cited, by way of comparison, *In re North American Light & Power Co.*, 170 F. 2d 924 (C. A. 3, 1948), a Section 11 (e) pro-

ceeding which also involved the settlement of intercompany claims, and Cogan attempts to distinguish that case on the ground of the greater complexity of the claims there involved and on the further ground that, unlike the situation in the instant case, North American was free "to stand or fall upon the original plan" (170 F. 2d at 931).

This argument misses the point of the Commission's reference to the *North American Light and Power* case. In that case the Commission, as in the instant case, assumed from the very existence of the relationship between a parent and a subsidiary holding company that negotiations for the settlement of the intercompany claims were not to be treated as though made at arm's-length. Having rejected the North American plan as originally submitted, the Commission, in furtherance of its affirmative obligation to bring about a simplification of holding company systems "as soon as practicable," undertook to specify what modification of the proposed settlement would be fair and equitable. In the instant case, the whole tenor of Cogan's contentions before the Commission, as well as its own findings, was that Market Street was not in a position to bargain at arm's-length with its parent, Standard Gas, in the settlement of the intercompany claims (see, for example, T. R. 402). Whatever significance might otherwise have attached to the fact that the settlement had been negotiated with Cogan as a representative of the public stockholders was vitiated in the Commission's view by the fact that Cogan had pursued conflicting personal interests. Accordingly, the Commission properly concluded that,

as in the *North American Light & Power* case, it was under an obligation to appraise the fairness of the settlement without giving weight to the fact that those who had negotiated it maintained it to be fair (P. R. 91).

Cogan appears to attach significance to the Commission's failure to regard as conclusive the refusal of the old board of Market Street, after the Standard Power litigation had been instituted, to amend the plan so as to provide clearly for a release of Standard Power. Instead the Commission permitted Graham-Newman Corporation, a large holder of prior preference stock, to solicit proxies for the election of a new board at the next annual meeting for the purpose of reversing the action of the old board, without holding a hearing on the qualifications of the new board to serve the interests of all the prior preference stockholders (see Cogan's Br., p. 25).

There is not the slightest suggestion in the record that Graham-Newman Corporation was in any way affiliated in interest with Standard Power, or that the new board was any less qualified than the old to speak for the public stockholders of Market Street, who had a clear interest in a prompt resolution of its problems in view of the fact that Market Street's assets were then in nonproductive form and were being depleted by expenses.[4] Certainly the Commission was not re-

[4] By contrast, members of the old board had an interest in doing nothing for fear of litigation with Cogan who had sent a night letter to the then president of Market Street advising non-acceptance of the amendment "as being contrary to the interests of Market Street * * * and yourself" (PR. 233; see our opening brief, p. 15, n. 16).

quired to hold a hearing, as Cogan contends (p. 25), to determine whether the new board was "composed of disinterested persons holding office for the purpose of representing the minority stockholders as well as the majority stockholders."[5] There is obviously no impropriety in the solicitation of proxies by a stockholder entitled to share in the residual equity in the company, who does not agree with the action of the board in rejecting a suggested amendment to the plan and wishes the amendment to be approved and the plan, as amended, consummated so that distribution can be made. As stated by the district court in this connection (T. R. 739–40):

> I think the Commission acted in the utmost good faith in making his [sic] supplemental finding, irrespective of the fact how the directors of Market Street Railway Company was composed, what change that was made, or like matters.

In any event, the basic issue presented is not whether the plan or its amendment is the production of arm's-length negotiation but whether it is "fair and equitable." As stated in the *North American*

[5] Cogan refers to a 1944 opinion of the Commission in *Standard Gas and Electric Company*, 16 S. E. C. 85, where the Commission stated that it would consider, with respect to the sale or distribution of Standard Gas' holdings of stock of its subsidiaries "what requirements are to be imposed, with regard to * * * the election of independent directors, in order to insure actual divestment of control of the subsidiaries by Standard in compliance with our Section 11 (b) (1) order." Market Street, however, is being dissolved under the Section 11 (e) plan and therefore there is no problem of preventing control of that company by Standard Gas.

case (170 F. 2d at 931):

> Assuming that the proffered plan can be rejected without more, there seems to be no basis, in reason or common sense, for refusing to entertain a modification designed to cure the defects discovered by the Commission. It is but another step, and a progressive one at that, for the Commission to state not only the rationale of its rejection of the initial plan, but also to suggest the amendments which in its opinion and discretion would be necessary to bring the plan across the line of acceptability. Such procedure commendably accelerates the business at hand, and that is a consideration not without importance in this type of case. If the plan as amended conforms to the statutory requirements, and opportunity be given interested parties to have their say, we can see no reason for postponing the period of convalescence by prolonging the surgical operation of severing the subsidiary from the parental body.

II

The court below adequately reviewed the record in holding that the Commission's approval of the plan as amended to provide for a release of Standard Gas and its subsidiaries, including Standard Power, is supported by substantial evidence

Cogan asserts (pp. 44–45) that, despite his contention in the court below that the Commission's findings and opinions approving the plan as amended to provide for a release of Standard Power were not supported by substantial evidence, the court "followed a standard of judicial review the Supreme Court has since held to be improper" in *Universal Camera Corporation* v. *N. L. R. B.,* 340 U. S. 474 (1951), and

its companion, *N. L. R. B.* v. *Pittsburgh Steamship Company,* 340 U. S. 498 (1951). These cases applied *inter alia* Section 10 (e) of the Administrative Procedure Act, 60 Stat. 243–244, 5 U. S. C. § 1009 (e), which directs "the reviewing court" to "review the whole record or such portions thereof as may be cited by any party," taking "due account * * * of the rule of prejudicial error."

Cogan's objection is derived exclusively from a remark of the district judge, not objected to at the time, and made after listening to two days of argument, that he did not deem it necessary to examine a trunkful of documents comprising the entire administrative transcript and exhibits (T. R. 739). At that time the judge announced the impression which the argument had left on him to the effect that the plan should be approved (except for his disagreement with the Commission's treatment of Cogan's fee application) and stated (T. R. 744):

> If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn't want to shut any of you off.

Cogan made no response to this suggestion other than to inquire whether the case was to be remanded. The court replied "that would be my view of it" and inquired whether "there are some legal problems that have escaped any of us that would require more consideration" (T. R. 745). Cogan then made some suggestions wholly unrelated to the court's treatment of issues of fact. After discussion concerning the submission of a proposed order (T. R. 746–49, 752–53)

the court referred to the bulk of the exhibits tendered, which comprised the entire administrative record, and stated that the clerk "has a natural reluctance to take charge of such a big piece of property as that" and suggested a stipulation for withdrawal (T. R. 753). All parties agreed, including Cogan, who stated: "We can stipulate, your Honor, that material can go back to Washington" (T. R. 753). All this occurred prior to the entry of the first order on appeal. We believe, therefore, that Cogan's objection, first made in his present brief, comes too late.[6] In any event it is clearly lacking in substance.

At the July 6–7, 1950, hearing, the district court had before it the Commission's application for enforcement of the plan and the exhibits attached thereto which, among other things, consisted of the Commission's findings and opinions of September 30, 1949, and March 9, 1950, and the initial and amended plans for the dissolution of Market Street. Statements of objections and briefs in support thereof were submitted to the court by various parties including Cogan. In connection with the issue of a release for Standard Power, Cogan in his brief, and in oral argument before the court (T. R. 584, 715–21), summarized or quoted pertinent portions of various exhibits in the record, and read to the court a short excerpt from the transcript of hearings (T. R. 586–87).

[6] Cogan's excuse for not having raised this point either before the district court or in the statements of points filed in this Court is that he did not anticipate the holding of the Supreme Court. However, the Administrative Procedure Act has been on the statute books since 1946 and the *Pittsburgh Steamship* case was first before the Supreme Court in 1949. 337 U. S. 656.

The administrative record as summarized in the Commission's findings and opinion on the initial plan is typical of Section 11 (e) records in this type of case. It is derived substantially from various books and records which reveal the financial experience of the companies involved and their relationships to each other, as supplemented by the testimony of company officials. The Commission opinions are likewise typical, summarizing comprehensively the most pertinent of the basic facts, analyzing them in the light of the settlement proposed in the plan, and indicating the Commission's own independent conclusions and its underlying rationale.

Cogan had indicated before the Commission that his objections to the Commission's findings, which were more with respect to its conclusions than its factual recital, could be briefly stated (see T. R. 442–453, 458–459). In the brief which Cogan filed in support of his objections, and in his oral argument before the court (T. R. 618), he specifically referred to the transcript of the hearing on the Commission's order to show cause. This appears to be the only portion of the transcript of the hearings specifically cited to the court by Cogan for examination in connection with the issue of a release for Standard Power. Cogan urged that this record would show he had received a "brushoff" (T. R. 618). The purpose of the order to show cause, however, was not to receive additional evidence (although some evidence, cumulative and otherwise, was received by the hearing examiner either over the objections of Division counsel (T. R. 391, 421–22, 459–65; see also

our opening brief, p. 45, note 35) or with the latter's limited approval (T. R. 390–91)).[7] Its purpose was to permit argument on the proposed amendment to the plan providing for a release of Standard Gas' subsidiaries, since this amendment merely fortified the plan against a hitherto undisclosed action and defined the scope of the settlement in accordance with the basic assumption of the Commission in initially approving it.[8] The record was already substantially

[7] The Commission, in its supplemental findings and opinion, noted in this connection (P. R. 93, n. 4) :

"At the hearing on the order to show cause, there were placed in evidence the contracts pursuant to which the payments to Standard Power were made by Byllesby Engineering. These contracts have furnished the reason for such payments but have added nothing to what was previously before us as to the effect of the service charges on Market Street and the significance which we gave to the service charges generally."

In addition, Cogan was questioned by Division counsel as to the make-up of the Van Kirk Committee at that time in view of a letter received by the Commission from the Committee a few days before the hearing which, although listing Cogan as "Counsel," announced that the Committee supported the proposed amendment to the plan (T. R. 467–73; see our opening brief, p. 13, n. 13; p. 14, n. 14).

[8] Cogan recognizes (pp. 40–42) that among the alternative causes of action available to Market Street for the recovery of the overcharges paid for services from 1926 through 1929 was one against Standard Gas as well as against Standard Power, Ladenburg Thalmann and Company, and H. M. Byllesby and Company, and he admits (p. 42) "that there can be only one complete satisfaction" of such claim. Thus, Cogan's position is completely consistent with the Commission's approval, after full hearings, of the initial plan which provided for a release only of Standard Gas and which Cogan supported, and buttresses our contention stated in our opening brief (p. 51) that Cogan, in objecting to a release of Standard Power, in effect seeks a double recovery of the overcharges paid over to Standard Power.

complete. As stated by Cogan at the hearing on the order to show cause (T. R. 404):

> I would admit that the record itself, being one of investigation, covers all transactions had between Market Street Railway Company and Standard and its affiliates, in so far as they were presented as evidence.

The following colloquy between Cogan and the hearing examiner (T. R. 423) indicates that Cogan also conceived of the hearing on the order to show cause as not being evidentiary in nature:

> HEARING EXAMINER. Do you want to be sworn?
>
> Mr. COGAN. It is an order to show cause, your Honor. I simply feel that we are called upon to state the reasons why the Amended Plan is not fair and reasonable and should not be accepted.[9]

Cogan's statement of these reasons (T. R. 423–57) was clearly a legal argument. It can hardly be considered as evidence although he later swore generally to the truth of any factual statement he had made.

If it may be surmised that the district judge did not actually refer to these particular pages of transcript, it would be only because he had received the impression from Cogan's argument that nothing relevant was contained therein, other than points which had been adequately developed in the briefs or in the course of the two days of oral argument. Under

[9] After presenting his argument, however, he acceded to the suggestion of the examiner, over objection of Division counsel, that he be sworn as to the truth of the "factual statements" therein (T. R. 457–61).

these circumstances he was not obliged to explore the record for lurking error not specifically adverted to. See *In re Electric Power and Light Corporation,* 176 F. 2d 687 (C. A. 2, 1949).

We believe that there is nothing in the *Universal Camera* case which could have required the district judge to do more than he did. All that the *Universal Camera* case decides is that "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record" (340 U. S. at 487–488). It was concluded in consequence "that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function" (340 U. S. at 490). There is not the slightest suggestion in the opinion that either Act imposes upon reviewing courts the novel and impossible procedural burden of exploring administrative records in detail in a search for significant evidence not specifically adverted to by

the agency or the parties seeking to challenge agency action. In any event Cogan cannot complain of a procedural error not urged before the district court.

It is clear that the real challenge by Cogan is not to the basic facts as summarized in the findings of the Commission, but to the Commission's conclusion and judgment based on these facts that the settlement, viewed as covering the entire period from 1926 to 1935, is fair and equitable. We believe that the district court properly held that this conclusion is supported by substantial evidence.

Respectfully submitted.

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